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Supreme Court of the United States

October Term, 1974

No. 74-980

H. CLIFFORD LEE, CLARENCE J. BASSLER, JR., and THE COMMERCIAL BANK AT WINTER PARK, Co-Executors of the Estate of Edyth D. Bush, Deceased,
Petitioners,
vs.
HERSCHEL S. ARROWOOD and MARY JANE DICKMAN, as Executors of the Estate of Archibald G. Bush, Deceased
and
THE BUSH FOUNDATION
and
WARREN SPANNAUS, Attorney General of the State of Minnesota,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF MINNESOTA

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Petitioners pray that this Court issue its writ of certiorari to the Supreme Court of Minnesota to review the judgment of that court in Cause No. 44707.

OPINIONS BELOW

The opinion of the Supreme Court of Minnesota is reported in 224 N.W.2d 489, and is reproduced in the Appendix hereto, printed under separate cover, p. A1; the opinion of the District Court for Ramsey County, Minnesota, is not reported but is reproduced in the Appendix hereto, p. A31.

JURISDICTION

The decision sought to be reviewed is dated and was entered November 22, 1974 (A1); petition for rehearing, seasonably filed, was denied December 23, 1974 (A37); and judgments were dated and entered January 20, 1975. (A39 and A40.)

This Court has jurisdiction to review under 28 U.S.C. 1257(3).

QUESTION PRESENTED

The question presented is:

Whether due process is denied when a prior state court judgment is held res judicata of the issue in suit, even though

(1) *the party sought to be bound* by that judgment

(a) was not a party to the prior action in any personal capacity,

(b) was incompetent when the prior judgment was entered;

(2) *the question adjudged* to have been determined by the prior judgment

(a) was not an issue in that case

(b) under state law could not have been an issue; and

(3) *there has never been evidence or hearing* in any court on any of these questions.

APPLICABLE CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the Constitution of the United States provides in § 1:

"No State shall * * * deprive any person of * * * property, without due process of law * * *."

STATEMENT OF CASE

The Supreme Court of Minnesota has denied a widow, of whose estate petitioners are Executors, the right to renounce her husband's will.

In shocking disregard of the demands of due process, the Supreme Court of Minnesota held:

1. The widow's right to renounce is barred *by a prior state court judgment,* even though:

   (a) the widow was *not* a party in that case in her personal capacity,

   (b) the widow's right to renounce was *not,* and could not have been, an issue in that case, and

   (c) the widow, by reason of a massive stroke was, and, when the judgment was entered, had been, incapacitated *for more than a year,* for which guardians had not then been appointed for her.

2. The prior judgment is res judicata, even though *there has never been evidence or hearing in any court anywhere* on the questions:

   (a) whether the widow was a party to the prior judgment in *any* personal capacity,

(b) whether the widow's right to renounce was, or could have been, *an issue* in that case, and

(c) whether *the widow's incompetence* would, in any event, necessarily bar treatment of the prior judgment as res judicata.

3. The widow's rights are *barred by dictum* in an opinion of the Supreme Court of Minnesota in another action two years earlier, even though:

(a) the widow was *not* a party in *any* capacity whatever in that case,

(b) the *sole* question in that case was whether the Attorney General of Minnesota was entitled to recover compensation for the services of his Special Counsel in the prior action,

(c) the right to renounce was *not* an issue, and was *not even mentioned* in the record or briefs in that case, before the Supreme Court of Minnesota, and

(d) the Minnesota Supreme Court held dictum in the earlier case binding on the novel ground that "*Even dictum* [two years earlier on a matter not before the court and not discussed by any party] if it contains an expression of the opinion of the court, is entitled to considerable weight." (A25.)

That the highest court of a State can so mutilate the concept of due process underscores the need for this Court's attention.

Petitioners challenged such arbitrary denial of due process on the ground:

> "The decision of this Court violates the requirements of the Fourteenth Amendment (Section 1) to the Constitution of the United States" (A-381)

and in their petition for rehearing in the Supreme Court of Minnesota averred:

"The widow's right has been taken away without the procedural due process the Constitution requires (Petition for Rehearing, p. 3)

and further said:

"There has been no hearing at any time in any court on these facts. That this is a denial of due process is clear * * *. (Petition for Rehearing, p. 5.)

The Supreme Court of Minnesota looked at the matter in this light:

"The estate has now been largely, if not wholly, distributed according to the wishes of both Mr. and Mrs. Bush [although the whole point of the litigation was that it had *not* been distributed in accord with her wishes, and although, when this action was brought, the then last account of the husband's Executors disclosed assets still in their hands of the value of more than $80 million]. If Mrs. Bush's right to have some control over the operation of the Foundation had any value during her life, that right has now vanished by virtue of her death. She no longer could have any voice in controlling the affairs of the Foundation and it seems to us that these claims are now moot.

Inasmuch as we hold that the Godfrey decision [that had nothing to do with the issue of this case] was res judicata of all of the issues appellants seek now to try, it must follow that the summary judgment of the court must be, and is, affirmed." (A30.)

This is to say that if a widow can be tricked out of her right to half her husband's estate, the malefactors will go free if she will but die.

The result is that funds the widow designed for The Edyth Bush Charitable Foundation based in Florida, the residuary legatee under her will, will go to The Bush Foundation based in Minnesota.

—The Cause of the Controversy

The Executors of the husband's estate and Directors of The Bush Foundation (established by the widow and her husband 13 years before his death) were, for reasons of their own, (a) oddly *delaying* the closing of the estate, (b) *refusing to carry on* the affairs of the Foundation in the manner she and her husband had planned, and (c) *seeking to divert the assets* of the estate from the Foundation which was the residuary legatee in the husband's will.

So distressed was the widow that, within the time allowed by law, she executed a renunciation of her husband's will so that she might contribute her share of the estate to the charitable purposes she approved rather than have it go as Respondents designed.

Her decision to renounce brought instant response from Respondents.

Settlement resulted.

In consideration of the widow's agreement not to file the renunciation she had executed, Respondents agreed to give the widow a veto over actions proposed by The Bush Foundation. This was to be done by providing for a bicameral Board of Directors, the widow and two Directors favorable to her to constitute Class B Directors with three votes (so that even after her death the Bush family influence would continue in Foundation affairs), and the others to constitute Class A Directors with four votes.

The affirmative vote of *each* house was to be required for action by the Foundation.

The articles and by-laws of the Foundation were amended pursuant to the agreement.

In reliance upon the settlement, the widow withheld filing the renunciation she had executed.

—The Breach

Once the settlement had been made and the statutory period for filing the renunciation had passed, Respondents did an about-face. They:

1. Pursued the Minnesota Probate Judge to the ski slopes at Vail, Colorado, and *without notice to the widow or her counsel* obtained an *ex parte* order vacating the probate court's earlier order wherein the probate court had (a) adjudged The Bush Foundation *to be the residuary legatee* under the husband's will and (b) *directed a preliminary distribution* to the Foundation of accrued income in the sum of $2,500,000.
2. Refused to appeal the *ex parte* Colorado order.
3. To have available a vehicle into which could be diverted the assets of the estate, activated the A.G. Bush Institute, a paper corporation established by the husband a year before his death. The Institute had *never* had a meeting, had *no* assets, had *no* by-laws. The Institute was named in the will as an *alternative* legatee to receive the residue in case The Bush Foundation "be unable to take * * *."
4. Petitioned the Minnesota probate court *to vacate the order approving the settlement.* (That petition ultimately was dismissed by the probate court; hence the adjudication approving the now repudiated settlement still stands.)

—The Remedy Pursued

The widow, as Chairman of The Bush Foundation and as a Director, and the two Directors favorable to her, brought a derivative suit in their representative capacity in state court in Minnesota to adjudge that The Bush Foundation *is* the residuary legatee under the husband's will, to enjoin acts of Respondents designed to defeat distribu-

tion to the Foundation, and to remove the Executors of her husband's estate and the Class A Directors of The Bush Foundation for their breaches of duty. The widow *asserted no personal right;* she *did not seek renunciation.* She sought *only* to compel respondents to carry out her husband's will.

It was in that action (but *after the widow's disability),* that the judgment, referred to as the Godfrey judgment, now held res judicata of her personal rights, was entered. What the judgment did was to *repudiate* the settlement and give the widow a cause of action either:

1. to be restored to her right to renounce her husband's will, or
2. to recover damages for breach of the settlement contract.

Now she has been done out of both.

Upon the breach of the settlement contract—

—Two Actions Were Brought

Since the widow was obviously entitled either to be restored to her right to renounce, or to recover damages for the breach of contract:

1. The widow's guardians, at the direction of the probate court in Florida, brought suit in federal court to recover damages for the breach of contract, and in addition
2. The widow's guardians filed in the Minnesota probate court the renunciation the widow had withheld filing in reliance upon the settlement. This was the starting point of the present litigation.

The United States District Court, without hearing any evidence, by summary judgment "dismissed the complaint

on the merits citing the alternate bases of res judicata, collateral estoppel and absention" 500 F.2d at 138; the United States Court of Appeals for the Eighth Circuit, *Lee v. Arrowood* (8 C.A., 1974), 500 F.2d 138, affirmed "solely upon the basis of abstention" and, without deciding the breach of contract claim of which the court admittedly had jurisdiction, remanded "to the District Court for the single purpose of modifying the judgment to reflect abstention as the basis for dismissal rather than a decision on the merits." 500 F.2d at 143. This Court on January 13, 1975, denied certiorari, No. 74-551, to review that judgment.

Petition requesting this Court to reconsider that denial is, concurrently herewith, being filed so that this Court, with the present petition, may have the full shabby story before it.

REASONS FOR GRANT OF WRIT

The writ should issue because it obviously needs to be made clear that under the demands of due process:

1. *A state court judgment in a derivative suit* brought by one in a representative capacity may not be held res judicata of the personal rights of the representative on an issue that was not, and could not have been, raised in that suit, nor can any judgment bind one known for more than a year prior to the entry of judgment to have been incompetent.
2. *No judgment may operate as res judicata where there has never been a hearing or evidence in any court anywhere* to determine whether the litigant whose rights are held barred by the prior judgment was a party thereto or whether the issue held foreclosed could have been raised in that proceeding.
3. *Dictum, even of a state supreme court, in a separate action two years earlier,* cannot bar the rights

of a litigant who was not a party in that action in any capacity and where the issue now adjudged foreclosed was in no way involved.

CONCLUSION

The writ should issue.

Respectfully submitted,

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Supreme Court of the United States

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF MINNESOTA

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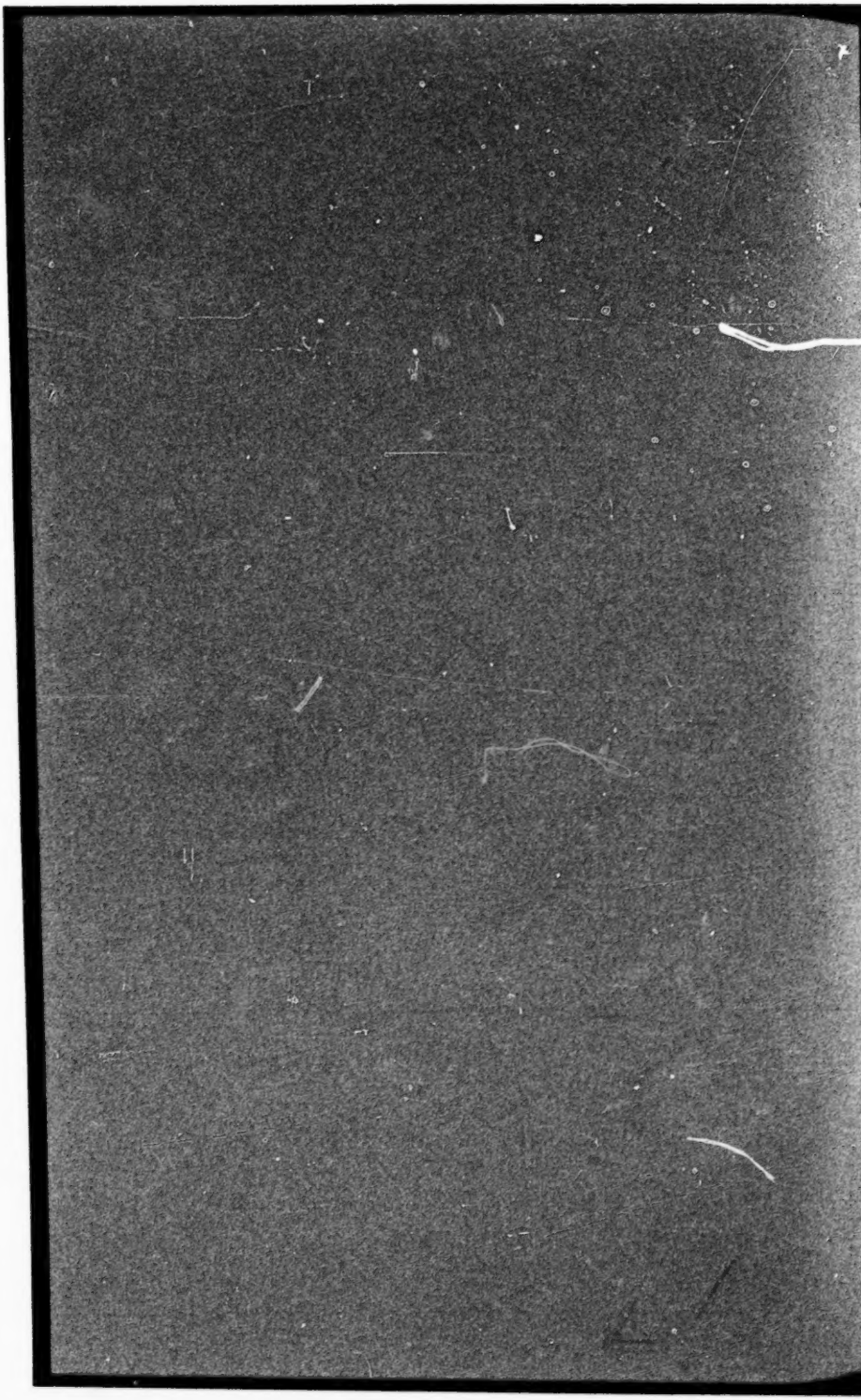

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OPINION OF SUPREME COURT OF MINNESOTA

224 N.W.2d 489

No. 200—Ramsey County

Knutson, J. Took no part, Sheran, C. J., Otis, J.
Endorsed. Filed November 22, 1974
John McCarthy, Clerk, Minnesota Supreme Court

In re ESTATE OF ARCHIBALD G. BUSH,
a.k.a A. G. BUSH, Decedent.

H. CLIFFORD LEE, *et al.*, Co-Executors of the
ESTATE OF EDYTH D. BUSH, Deceased,
Appellants,

44707 vs.

HERSCHEL S. ARROWOOD and MARY JANE
DICKMAN, as Executors of the Estate of
ARCHIBALD G. BUSH, Deceased,
Respondents,

THE BUSH FOUNDATION,
Respondent,

WARREN SPANNAUS, Attorney General of the
State of Minnesota,
Respondent.

SYLLABUS

1. A judgment entered by the district court pursuant to a stipulation for settlement of an action involving the administration of a charitable foundation, to which judgment all parties agreed and in which the personal rights of the widow of the testator who bequeathed to the founda-

tion all the residue of his estate, as well as disputes relating to management of the foundation and the administration of the husband's estate, are resolved, is res judicata as to all matters covered by the judgment.

2. A district court in the determination of an appeal from probate court pursuant to Minn. St. 525.72 may grant summary judgment where there are no issues of fact that can be litigated.

Affirmed.

Considered and decided by the court en banc.

OPINION

Knutson, J.*

This is an appeal from a judgment entered in the District Court of Ramsey County granting summary judgment to defendants and dismissing an appeal from an interlocutory decree of the Probate Court of Ramsey County declaring that Mrs. Bush's purported renunciation of her husband's will was of no force and effect.

The case is the culmination of much protracted litigation and many legal skirmishes resulting from the probate and settlement of the will of Archibald G. Bush. The facts and legal maneuvers of the interested parties are so involved that it seems best to relate them in considerable detail even at the risk of an unduly lengthy opinion in the hope that the decision we now make may see an end to this protracted and expensive litigation.

The trial court has set forth in detail in his memorandum decision the facts essential to a determination of the issues now before us. We doubt that we could

*Retired Chief Justice acting pursuant to Minn. St. 2.724.

improve upon them. So, we adopt as the facts in this decision that portion of the court's memorandum decision that is relevant to the issues involved. We quote and adopt the following from that decision.

"The will of Archibald G. Bush, made April 21, 1965, designated The Bush Foundation as the residuary beneficiary of his estate, with the limitation that, if it be unable to take 'or if bequests to it be not deductible for Federal estate tax purposes', the residue would go to the A. G. Bush Institute. It further provided, that, if neither the Foundation nor the Institute be able to take or 'if bequests to them be not deductible for Federal estate tax purposes', the executors should organize a non-profit corporation to which the residue would go instead.

"Mr. Bush, in his Will, expressly made no provision for his wife, Edyth Bush, because it recited they had 'agreed' that the form of 'testamentary plans' 'set out in this agreement is the most suitable.' Attached to the Will is a 'consent of spouse' of the same date, signed by Edyth Bush, which states that she had read the Will and understood its content that she ratified and consented 'to all dispositions made in it' and that she understood that the law gives her 'a much greater interest' than provided in it.

"Both the Will and the consent were witnessed by persons whom the Court regards to be highly competent lawyers. They were Walter N. Trenerry, Philip Stringer and David R. Roberts.

"The Court understands from the file that both Mr. and Mrs. Bush had previously contributed to The Bush Foundation. The Will gave no direction as to how The Foundation must be operated. It indicated

only that it must be able to take and that the donor's bequests to it be 'deductible for Federal estate tax purposes'. And it suggested the thought that whatever corporation might be formed to take be 'operated exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art'.

"The Will specifically gave Mr. Bush's Florida house to the Foundation along with a proviso that Mrs. Bush could occupy the premises so long as she might wish without charge. Mr. Bush died at Winter Haven, Florida, on January 16, 1966. His estate has been in probate in Ramsey County District Court in Minnesota since early after that. It has been a subject of controversy almost from the beginning of the probate.

"Notwithstanding her consent attached to the Will, Edyth Bush, after Mr. Bush had died, indicated an intention to renounce the Will's provisions. Under date of August 27, 1966, she entered into an agreement of compromise and settlement of that issue with the executors. Her claim as stated in the written agreement was that 'she was not informed of the contents of the said Will, of the extent, nature or character of her husband's estate, of the provisions made for her in the said Will, nor of her statutory rights as the surviving spouse of her said husband'.

"In the compromise agreement, Edyth Bush was to be paid $2,100,000; all the outstanding stock of Bush Management Company was to be sold to her for $250,000; the services of David R. Roberts, and Walter N. Trenerry as counsel for the executors and of H. C. Lee and Philip Stringer as their special counsel

would be retained, and a prompt petition would be made to the Ramsey County Probate Court and the County Court of Orange County, Florida, for approval.

"Mrs. Bush in turn agreed in the stipulation of settlement that she had been fully advised by Bernard E. Epton, an attorney of hers in Chicago, of the nature and extent of her husband's estate which would likely exceed $130,000,000, of the provision in the Will giving her a life interest in the Florida home, and of her right under the Minnesota and Florida statutes to renounce her late husband's Will and take half of the estate which would amount to approximately $66,000,000. She further agreed to waive any right to renunciation of the Will and that she confirmed and approved her consent attached to the Will. The instrument stated, in effect, that it had to be approved by the Court to be valid. It was signed by Mrs. Bush and by the executors of the Estate.

"The agreement of compromise was approved by the Probate Court of Ramsey County on August 30, 1966, and by the Orange County, Florida, County Court on September 7, 1966.[1]

"It is to be observed that that agreement contained no mention as to how the Foundation must be operated. The Foundation did agree to provide for two classes of directors. It amended its Articles of Incorporation and By-Laws, accordingly, to provide for the two classes of member-directors and, in effect, that all action of the Foundation 'should thereafter be exercised exclusively by a majority vote of each of the two classes of directors on a bicameral basis.' (The appellants' propositions of law and fact on this appeal

1. Ancillary proceedings were pending in Florida.

state that the Foundation and the executors agreed to 'be guided by the wisdom and leadership of Mrs. Bush' and to submit to her all requests for gifts or grants.)

"Subsequently, in June of 1967, petition was made to the Ramsey County Probate Court for partial distribution from the Estate to the Foundation. *Mrs. Bush was one of the petitioners;*[2] and she stated in the document that she was petitioning as the surviving spouse and sole heir of the decedent, as a legatee under his Last Will and Testament, and as a member, Class B director and Chairman of the Board of Directors of The Bush Foundation. Other petitioners were Clarence J. Bassler, Jr., and H. Clifford Lee, as members and Class B directors of the Foundation, and The Bush Foundation itself. The petition recited that it was filed because the representatives had failed to move expeditiously to close the estate. Attorneys for the petitioners were the firm of Oppenheimer, Hodgson, Brown, Wolff and Leach by Benno F. Wolff, Esquire.

"Supporting that petition was a memorandum in favor of the partial distribution, which was submitted by attorneys Benno F. Wolff, Esquire, and David C. Donnelly, Esquire, and Messrs. Oppenheimer, Hodgson, Brown, Wolff and Leach, all of St. Paul and by Theodore C. Diller, Esquire, and Thomas P. Healy, Esquire, and Messrs Lord, Bissell & Brook, of Chicago. The memorandum recites in part:

'Even if her expired renunciation rights are restorable, which by now the Court must doubt, we now state unequivocally, as we did on oral argument: Mrs. Bush is interested in the entire residue of her hus-

2. Italics supplied.

band's estate becoming vested in The Bush Foundation, and not otherwise. She asks the Court to make no reservation on her account.'

"Referring to a Ramsey County District Court action by the Class B against the Class A directors of the Foundation, the memorandum continued:

'The District Court action may involve litigation concerning the corporate structure of the Foundation, but that is not within the jurisdiction or concern of the Probate Court. The residuary bequest having vested in The Bush Foundation as of the date of Mrs. Bush's death, the internal affairs of the Foundation subsequent to that date, though they may become the subject of District Court litigation * * * are not an impediment to the entry of a partial decree * * *.'

The memorandum added:

'* * * the situation in the estate, in the light of the indicated items remaining to be attended to by the executors, is such that there is no plausible reason for delaying the entry of a decree assigning to The Bush Foundation the substantial residue on hand, less only the reserve aforementioned.'

"On March 22, 1968, the Probate Court issued its partial decree of distribution and set forth that the estate had been substantially administered, that the portion of the residue then available for distribution was of the inventoried value of $45,761,161.03 consisting of Minnesota Mining and Manufacturing Company stock. That Court thereupon decreed that this property be 'hereby assigned to and vested in The Bush Foundation'. The Court file indicates that the Foundation did in fact receive this portion of the estate.

"Two factors in controversy appear patent in the District Court file. One is that Mrs. Bush wanted The Bush Foundation operated as she felt her husband may have wanted it to be run. Another is that the Estate of Archibald G. Bush has not been closed with any expeditiousness although she had been promised that it would be. Counsel on both sides in the present controversy have brought out that the combined properties of both Mr. and Mrs. Bush approximate a quarter of a billion dollars.

"The estate most certainly has been long in administration. Should it be necessary for this matter to go to trial, one of the fact issues will be whether the delay has been in the actual administration or whether it has been caused by the quantity of litigation in which it has been embroiled.

"The instant District Court file further reveals a trust instrument dated September 8, 1967, between Mrs. Bush as grantor and David R. Roberts, H. Clifford Lee and Mrs. Bush herself as trustees setting aside a fund 'to pay expenses, legal fees, and all other costs * * * of continuing, prosecuting and defending to a successful conclusion or settlement' of various proceedings and litigation 'for the benefit of The Bush Foundation, the benefit of her late husband's estate plans and charitable purposes, and her own benefit or defense.' The instrument further suggests 'the prosecution or defense of additional actions, lawsuits, appeals or other proceedings' in the future. The affidavit of Neil P. Convery attached to the copy of the trust instrument in the file states that the trust res consisted of shares of Minnesota Mining and Manufacturing Company stock having a present value of approximately $1,000,000.

"David R. Roberts is the identical name that appears as a witness to the Last Will and Testament of Archibald G. Bush and to the ratification and consent thereto by Edyth Bush.

"A lawsuit was commenced in Ramsey County District Court, the Complaint being dated January 11, 1968. (*Edyth Bush, as a member, a director and chairman of the board of directors of The Bush Foundation; Clarence J. Bassler, Jr., as a member and a director of The Bush Foundation; and H. Clifford Lee, as a member and a director of The Bush Foundation, in their representative capacities aforementioned and on behalf of The Bush Foundation (a Minnesota nonprofit corporation), Plaintiffs, vs. Herschel S. Arrowood, individually and as a co-executor under the last will and testament of Archibald G. Bush, deceased, and as a member, a director and treasurer of The Bush Foundation; Mary Jane Dickman, individually and as co-executor under the last will and testament of Archibald G. Bush, deceased; Cecil C. March, individually and as a member, a director and president of The Bush Foundation; Richard L. Post, individually and as a member, a director and secretary of The Bush Foundation; Honorable Edward J. Devitt, as a member and a director of The Bush Foundation; and Honorable Douglas M. Head, as Attorney General of the State of Minnesota, Defendants*—Ramsey County District Court File 356691.)

"The Complaint recited that Edyth Bush was the widow of Archibald G. Bush. It complained that the defendants, except Judge Devitt, who was a new A director, and the attorney general had combined in breach of their fiduciary duties to delay distribution to the Foundation; and that all claims had been paid

and all estate and inheritance taxes and expenses of administration had been either paid or reserved for payment, and that the year period for probate (M. S. 524.47) had expired without obtaining an extension of time from the Probate Court. The Complaint set forth what plaintiffs regarded as efforts of the executors to thwart distribution to the Foundation and the fact that they had obtained from that Court an order that referred to the Foundation as 'a contingent residuary legatee'. The matter, it indicated, had come before the directors to get rid of the word 'contingent'. The B directors were unanimous that efforts be taken to eliminate the word. The A directors, other than Judge Devitt who was new to the board, voted unanimously against it, the Complaint stated; the A directors expressed doubt that the Foundation could take and indicated that subsequent events might make the Foundation unable to take. The A directors refused to appeal from the Probate Court orders, and so *Edyth Bush individually*[3] and the B members did. The A directors other than Judge Devitt attacked the petition for partial distribution, according to the allegations.

"The file in that lawsuit is replete with motions and discovery, but the case ended first in a number of days of trial and then in settlement. Question had been raised as to the legality of having A and B directors. Now it was agreed:

"1. The Board would consist of 16 directors so long as Mrs. Bush lived. Thereafter there would be 15.

"2. She would be a lifetime director and chairman of the board. There would be a class of 3 Bush family

3. Italics supplied.

directors, consisting initially of C. J. Bassler, Jr., H. Clifford Lee and one other to be designated by them subject to approval by the Attorney General.

"4. The other 12 would be Cecil C. March, Judge Devitt, Elmer L. Andersen, Reuel D. Harmon and 8 others to be selected.

"5. Terms would be 3 years.

"6. Other than Mrs. Bush, nobody would be eligible for election after age 70.

"7. The Foundation would adopt a by-law disqualifying later members for election affiliated with a corporation whose stock or securities constitutes 5% or more in value of the Foundation's portfolio.

"8. Vacancies other than in family directorships would be filled by a vote of not less than 8 directors at a duly-called meeting.

"9. A quorum to do business would be 9.

"10. A president shall not be eligible for reelection after serving for 3 years.

"11. The board would determine voting the shares in the portfolio.

"12. 'There shall be no recovery of the $2,100,000 paid to Mrs. A. G. Bush in consideration of her execution of the Settlement Agreement and payment have been approved * * * by the Probate Court * * *.'

"15. 'The Court may award the sum of $50,000 to the plaintiff "B" directors and the sum of $50,000 to the defendant "A" directors * * * as allowances for attorney fees, costs, disbursements and expenses in this litigation * * * and * * * the decree * * * shall

provide that payment thereof constitutes satisfaction in full to the parties mentioned. * * *.'

"20. 'The executors agree to take prompt action * * * to procure entry of a final decree in the Probate Court assigning the residue of the estate of Archibald G. Bush to The Bush Foundation.'

"The stipulation of settlement, being dated September 17, 1969, was signed by obviously competent counsel as follows:

"For the plaintiffs—Messrs Oppenheimer, Hodgson, Brown, Wolff and Leach by Benno F. Wolff, Esquire, and David C. Donnelly, Esquire, of St. Paul, and Messrs Lord, Bissell & Brook by Theodore C. Diller, Esquire, and Thomas P. Healy, Esquire.

"For defendants Devitt, March and Post—Messrs Altman, Geraghty, Leonard & Mulally by Richard J. Leonard, Esquire, and Sydney C. Berde, Esquire.

"For defendant, Elmer L. Andersen—Richard J. Leonard, Esquire.

"For The Bush Foundation—Richard J. Leonard, Esquire, and Benno F. Wolff, Esquire.

"For the defendants Arrowood and Dickman—Messrs Smith, Blomquist, Vitko & Rummel, by Bertrand Poritsky, Esquire, and Neil P. Convery, Esquire.

"For Douglas M. Head, the attorney general—Robert J. Christianson, Esquire, Wright W. Brooks, Esquire, and John E. Harris, Esquire.

"The stipulation of settlement was to be approved by the Court within 40 days. However, problems apparently appeared; and on March 31, 1970, the Dis-

trict Court, upon request of counsel, agreed that the time for subsequent amendments to the stipulation would be extended to April 10, 1970.

"The stipulation was in fact approved by the Ramsey County District Court (Honorable Otis H. Godfrey, Jr., District Judge).

"It is observable at this point that the corporate arrangement for the board of directors which the stipulation arrived at differed from the structure with A and B directors which Mrs. Bush had wanted earlier. Taking the language of her Complaint in this action, she was suing as a director. Yet this was not an action by the Foundation, for neither she nor the other plaintiffs had corporate authority to bring the action. They were all suing as individuals to compel a certain result. They were not separate personalities, such as trustee or executor for instance, by which they could sue. Mrs. Bush, through her attorneys, agreed to the new board arrangement. She personally received benefit from the Court determination.

"Hearing was held in Probate Court in St. Paul on April 17, 1969, on a petition for a second partial decree of distribution. Appearances were practically the same as in the District Court case, except that there was a representative present for First Trust Company of St. Paul. The Probate Court on May 15, 1969, decreed the distribution of real and personal property to The Bush Foundation of the total value of $44,029,646.69. In connection with that hearing, attorneys for the executors of the Archibald G. Bush estate gave notice in writing to Edyth G. Bush that if that second partial distribution would be made to the Foundation, 'such a transfer will reduce the

amount of estate assets in the executor's hands to $36,395,677.06, and may impair your rights under Minnesota Statutes 525.16 and 525.212 if you should later decide to attempt to renounce Mr. Bush's will.' Notice of the filing of the second partial distribution decree and order was served upon Mrs. Bush personally on June 24, 1969.

"In connection with the notice to Edyth Bush and the second partial distribution, it is to be observed that Mrs. Bush apparently was advised as to the amount being distributed and what remained in the estate. She took no steps to repudiate the distribution and in fact acquiesced in it. Should a later renunciation be attempted and possibly accomplished by her, the Foundation would be obliged to return substantial amounts to the executors of the Archibald G. Bush estate in order for her to receive distribution of her widow's half.

"On April 27, 1970, executors of the estate petitioned the Court for permission to distribute to the Foundation a further or third partial distribution including cash in the amount of $1,712,610.35, 'being the entire net income earned by said estate during the calendar year 1969'. The Probate Court on May 5, 1970, decreed this distribution to The Bush Foundation, and it was in fact so distributed. Notice of the filing of the decree was served on Edyth Bush personally at her Florida home on June 1, 1970.

"Intermediate accounts in the estate had been duly filed with the Court and allowed. There was subsequently filed in Probate Court the executors' petition for final account of October 15, 1971. The petition was dated November 23, 1971.

"On November 6, 1970, Edyth Bush had been declared incompetent by the County Judge's Court of Orange County, Florida. One group of individuals was declared guardian of her person. David R. Roberts and the Commercial Bank at Winter Park, Florida, were appointed guardians of her property.

"On October 12, 1971, the co-guardians filed in the Probate Court of Ramsey County what was purported to be a renunciation on her behalf of the Will of Archibald G. Bush. David R. Roberts, one of the guardians, is the identical name that appeared as a witness to the Last Will and Testament of Mr. Bush and on the consent and ratification of the Will by Edyth Bush. This attempted renunciation was declared by the Honorable Andrew A. Glenn, Judge of Probate Court in Ramsey County, on March 1, 1972, to be of no force and effect; and Judge Glenn's order reiterated the position that the 'said widow and her co-guardians have no remaining interest in the estate.'

"This Probate Court determination has been appealed from in her behalf by the guardians. Meanwhile, and on November 20, 1972, Edyth Bush died. Probate of her estate has been commenced in Minnesota. The Ramsey County Probate Court file (134172) reveals a controversy as to whether she died a resident of Minnesota or of Florida.

"Action was commenced in the United States District Court, Minnesota, Third Division, by *H. Clifford Lee, Clarence J. Bassler, Jr., and the Commercial Bank at Winter Park as co-executors of the Estate of Edyth Bush, Plaintiffs, vs. Herschel S. Arrowood, individually and as a co-executor, and as a former director of The Bush Foundation; Mary Jane Dickman, individ-*

*ually and as a co-executor * * *; Cecil C. March, individually and as a director * * *; Honorable Edward J. Devitt, individually and as a director * * *; Richard L. Post, individually and as a former director * * *; Reuel D. Harmon, individually and as a director * * *; The Bush Foundation * * *, Defendants* (Court File No. 3-72 Civil 98).

"That case involved much of the same disputed claims that were being made in the State courts. The Federal Court concluded in an 81 page opinion that it had jurisdiction over the subject matter. But it added that, without regard to the issue of res judicata, it should abstain from assuming jurisdiction where the Probate Court had previously handled the matter and 'has jurisdiction for enforcement.' The Federal Court added that 'the plaintiff should not now here be permitted to re-litigate the issues which have heretofore been litigated in the prior actions.'

"That Court then, however, concluded that 'this cause should be dismissed on the ground of res judicata, collateral estoppel and abstention.' It added:

'This Court does not reach the question of laches; however, it is pertinent for this Court to point out that there was a delay from 1966, when the action allegedly arose, until 1971 before any affirmative action was taken on the question of breach of the original agreement. This indeed is a lengthy, if not totally fatal delay.'

"One of the issues in our instant case is whether Mrs. Bush did not wait too long to file her attempted renunciation of the Will of Mr. Bush. Her guardians argue that she did not. The executors, they argue, in effect, had misled her by purporting to stipulate

a settlement, but that after it would normally be too late for her to renounce the Will, the stipulation was breached; the executors and A directors said the division of A and B directors was illegal and the executors did not proceed diligently to close the estate.

"It became the conclusion of respondents, except the attorney general and Judge Devitt, that a corporate arrangement for A and B directors on a bicameral basis was illegal under the Minnesota non-profit corporation statute. M. S. 317.20, Subd. 1, does not in fact provide for a bicameral directorship. It states simply:

'A board of at least three directors shall manage the business of the corporation.'

"The Court does not attempt here to rule on whether a bicameral directorship is legal. At least, by stipulation of counsel and approval by the District Court, a single directorship with Mrs. Bush as chairman was adopted as part of the settlement agreement.

"The propositions of law and fact filed by the executors of Mrs. Bush's estate include in effect the following: Within six months after commencement of probate, Mrs. Bush indicated her intention to renounce the Will. On August 27, 1966, to prevent her from renouncing it, an agreement of settlement was entered into. The Foundation amended its articles and by-laws to provide for a bicameral directorship. The Foundation agreed to be operated as it had been before Mr. Bush died in the manner whereby the advice and counsel of Mr. Bush had been sought before he died, 'so that The Bush Foundation would be operated in the manner and for the purposes intended by Mr. and Mrs. Bush.'

"The propositions state that the executors proceeded to breach the stipulation so that there was no consideration for it; the stipulation for reorganization was entered into by her attorneys without her authority and she would not have consented to it. The propositions further indicated that she was defrauded into joining in the stipulation.

"The Bush Foundation agrees that Mrs. Bush waited too long to renounce the Will and also that the right of renunciation died with her. It joins with the arguments in behalf of the executors and the attorney general who seek summary judgment in their favor.

"M.S. 525.212 states:

'* * * such spouse shall be deemed to have elected to take under the will, unless he shall have filed an instrument in writing renouncing and refusing to accept the provisions of such will within six months after the filing of the certificate of probate. For good cause shown, the court may permit an election within such further time as the court may determine * * *.'

"The Probate Court did not permit a renunciation after the six months had passed. If the appeal to this Court is proper, it would seem that it is a fact question for trial as to whether good cause for extension of time has been shown. Good cause was not shown at least as of the time Mrs. Bush's attempted renunciation was filed."

While the case seems quite complicated and much legal argument has been presented to us, it really involves a determination of two issues: (1) May the district court on appeal from an order of the probate court grant summary judgment? (2) Is the decision of the Honorable

Otis H. Godfrey, Jr., referred to in the above statement of facts, res judicata of the issues plaintiffs now seek to try? Hereinafter, the opinion of Judge Godfrey will be referred to as the Godfrey decision.

The procedure upon an appeal to the district court from an order of the probate court is found in Minn. St. 525.72, which reads:

> "Within 20 days after perfection of the appeal, the appellant shall file with the clerk of the district court, and serve upon the adverse party or his attorney a clear and concise statement of the proposition, both of law and of fact, upon which he will rely for reversal of the order, judgment, or decree appealed from; within 20 days after such service the adverse party may serve and file his answer thereto and the appellant, within 20 days thereafter, may serve and file a reply. If there be no reply, allegations of new matter in the answer shall be deemed denied. *Demurrers shall not be permitted. The district court may allow or require any pleading to be amended, grant judgment on the pleadings, or, if the appellant fail to comply with the provisions hereof, dismiss the appeal.*
>
> "After issues are so formed, the case may be brought on for trial by either party by the filing and service upon the attorney for the adverse party, or if he have none, then upon the clerk for him, of a notice of trial or note of issue, in accordance with the practice in the district court. *Thereupon the cause shall be placed upon the calendar, tried, and determined in the same manner as if originally commenced in that court.* All appeals other than those from the allowance or disallowance of a claim shall be tried by the court without a jury, unless the court orders the whole issue, or some specific question of

fact involved therein, to be tried by a jury or referred." (Italics supplied.)

Appellants, who are the executors of Mrs. Bush's estate, contend that under this statutory provision, while the district court may grant judgment on the pleadings, it may not grant summary judgment.

We think it best to first dispose of the question of whether the judgment entered pursuant to the Godfrey decision is res judicata so that, if it is, the question of whether the district court had the right to grant summary judgment may be considered in light of the fact that litigation of all the fact issues appellants now seek to litigate in this case is barred by the res judicata effect of the Godfrey judgment. It seems to be the contention of appellants that they have a right to a trial de novo on these issues even if the Godfrey decision is found to be res judicata and a bar to litigation of such issues.

Essentially, it is the contention of appellants that the Godfrey decision is not res judicata because (1) Mrs. Bush appeared in the action leading to the Godfrey judgment in her representative capacity as a director of the Bush Foundation and not in her individual capacity; (2) the requisite identity of causes of action between the case culminating in the Godfrey judgment and the case now before us is absent; and (3) the stipulation on which the consent judgment entered by Judge Godfrey was based was made by Mrs. Bush's counsel without her knowledge and without her authority. Each of these arguments can probably be considered separately.

Appellants state that the identity of parties in the two actions is lacking because in the one resulting in the Godfrey decision Mrs. Bush appeared in her representative capacity and in this case she, through her representa-

tives, appears in her individual capacity. The general test is whether the named party is the real party in interest or a mere nominal party. See, Olson v. Linster, 259 Minn. 189, 107 N. W. 2d 49 (1960); Schmitt v. Emery, 215 Minn. 288, 9 N. W. 2d 777 (1943); Bamka v. Chicago, St. P., M. & O. R. Co. 61 Minn. 549, 63 N. W. 1116 (1895). On the question involving the identity of the parties, the trial court held:

> "* * * Taking the language of her Complaint * * *, she [Mrs. Bush] was suing as a director. Yet this was not an action by the Foundation, for neither she nor the other plaintiffs had corporate authority to bring the action. They were all suing as individuals to compel a certain result. They were not separate personalities, such as trustee or executor for instance, by which they could sue. Mrs. Bush, through her attorneys, agreed to the new board arrangement. She personally received benefit from the Court determination."

It should also be mentioned that in the action involving the Godfrey decision, the attorney general was named as a defendant in the complaint, and, pursuant to Minn. St. 501.12, interposed a counterclaim and cross-claim in behalf of the public in which he alleged that both Class A and Class B directors were in breach of their fiduciary duties. He also alleged that, except for the amount allocable to maintenance of the Bush home in Florida, Mrs. Bush should disgorge the $2,100,000 she had received as part of the prior settlement. Whether this counter-claim was permissible under Rules of Civil Procedure, Rules 13.01 and 13.02, which require that a counterclaim be made against any "opposing party," we need not determine. Mrs. Bush answered this counterclaim in her personal capacity without seeking dismissal of it.

It is also abundantly clear that the stipulation of settlement upon which the Godfrey decision was based determined Mrs. Bush's personal rights as well as any she might have in a representative capacity. It was agreed, among other things, that she could retain the payment of $2,100,000; and the dispute over the two classes of directors also involved her personal rights. She also agreed to waive any right to renounce her husband's will.

Much could be said about the distinction between the doctrine of estoppel by judgment and collateral estoppel, but it would seem that in this case, no matter what basis we put it on, Mrs. Bush has agreed to a consent judgment which has been entered by a court having jurisdiction over the cause of action; that no appeal has been taken from that judgment; and that it still stands as a valid judgment. So, it must be held to be binding on the issues actually settled in that litigation. Whether it be through an estoppel by judgment or a collateral estoppel, the consent judgment is binding upon her. With respect to the consent judgment, we said in the case of Pangalos v. Halpern, 247 Minn. 80, 84, 76 N. W. 2d 702, 706 (1956):

> "* * * [A]n order made upon the application, or with the consent, of all the interested parties is not ex parte. The fact that such an order is made upon an agreed statement of the facts or is entered by consent or upon the agreement of the parties does not lessen its force or effect, and it is as binding upon the parties as if made after protracted litigation."

In the case of In re Application of Schaefer to Register Title, 287 Minn. 490, 493, 178 N. W. 2d 907, 910 (1970), we quoted with approval, the following from the Pangalos case (247 Minn. 85, 76 N. W. 2d 706):

> "* * * In the absence of fraud, a valid judgment, decree, or as here an order which is the equivalent thereof, entered by agreement or consent, operates as res judicata to the same extent as if it had been rendered after contest and full hearing and is binding and conclusive upon the parties and those in privity with them."

Had the case upon which the Godfrey judgment is based been tried and determined instead of disposed of by settlement, we doubt anyone would contend that the facts litigated therein were not res judicata. The stipulation went further than a trial in that the individual rights of Mrs. Bush were disposed of as well as her rights in a representative capacity. Had she tried these issues by consent, even though they were probably not included in the original pleadings, she would likewise be bound by the result.

It might be mentioned in passing that the case of Bush v. Arrowood, 294 Minn. 243, 198 N. W. 2d 263 (1972), was determined by this court some time ago. In that case the issue directly involved was the right of attorneys retained by the attorney general to be paid their fees out of foundation funds. In our decision in that case, we said in referring to the case upon which the Godfrey judgment was based:

> "* * * Due in a large part to the services performed by these attorneys, a stipulation of settlement was finally arrived at, and, on April 10, 1970, a judgment was entered in district court which disposed of the right of the widow to renounce the will of Mr. Bush, provided a workable board of directors for the foundation, and in many other respects provided an orderly and competent means of controlling and managing The Bush Foundation. None of the parties af-

> fected by that judgment appealed, and the res judicata effect of that judgment obviously is a substantial benefit to the foundation." 293 Minn. 246, 198 N. W. 2d 265.

While Bush v. Arrowood, *supra*, is not discussed in appellants' original brief, in their reply brief we find the following:

> "The Bush Foundation argues (pp. 39-40) that this Court has already said (in *Bush v. Arrowood*, 293 Minn. 243, 198 N. W. 2d 263): 'The res judicata effect of the Judgment and Decree [in the state court suit] cannot be disputed * * *.' This Court did not so hold. There the Attorney General sought recovery from the Foundation of attorneys' fees for his special counsel in the *Bush v. Arrowood* proceeding. The District Court held the Attorney General was entitled to recovery: this Court held he was not. That was the *only* question before this Court. This Court said: 'The *only question* on this appeal is the validity of the court's order directing the foundation to pay a portion of these attorneys' fees.'"

Appellants apparently contend that what we said in Bush v. Arrowood, and quoted above, is dictum and therefore not binding upon the court at this time.

It may be true that what we said in the former Bush case was dictum, but if it was, it at least was a strong indication of this court's belief at that time that the Godfrey judgment was res judicata. As a matter of fact, the stipulation and the Godfrey judgment were involved in a determination of the amount of fees the attorneys were entitled to recover if they were entitled to recover from the foundation at all. So, the question was at least directly involved in that case. The court had hopes at that time

that by indicating our belief that the Godfrey judgment was res judicata it would end this protracted litigation. Apparently our hopes were not realized. Even dictum, if it contains an expression of the opinion of the court, is entitled to considerable weight. We now hold that the judgment of the district court which decided the very questions appellants now seek to raise and litigate in this action is res judicata and bars any future litigation of these same issues.

In the case of State v. Rainer, 258 Minn. 168, 177, 103 N. W. 2d 389, 395 (1960), we said:

> "It seems clearly apparent that the statement and the reasoning in [State v. Lund, 174 Minn. 194, 218 N. W. 887 (1928)], even though this court in [State v. Nobles, 234 Minn. 38, 47 N. W. 2d 473 (1951)] referred to it merely dictum, was an expression of opinion on a question directly involved and argued by counsel though not entirely necessary to the decision. The expression of the court, under such circumstances, qualifies as judicial dictum and as such is entitled to much greater weight than mere obiter dictum and should not be lightly disregarded."

We quoted (258 Minn. 178, 103 N. W. 2d 396) from the opinion of Judge Donovan of the United States District Court in the case of Goodson v. United States, 151 F. Supp. 416, 420 (D. Minn. 1957), the following:

> "In ascertaining the Minnesota law on this question the federal court is not bound by dicta. * * * Yet while dicta are not conclusive evidence of the law of any state, *considered dicta*, as distinguished from mere obiter dicta, *should not be ignored*, * * * and are even entitled to great weight." (Italics supplied.)

We, therefore, agree with the trial court that, when consideration is given to the stipulation of all the parties and the final disposition of the case and entry of judgment by Judge Godfrey, there is sufficient identity of the parties to meet the test of res judicata. We also hold that there is sufficient identity of causes of action. As a matter of fact, the same causes of action were involved in both cases and once the identity of the parties is established, the causes of action also become identical. Essentially, determination of whether the causes of action are the same depends to some extent on whether Mrs. Bush appealed in her individual capacity. It seems clear that she did.

The only other contention that merits discussion is the claim now made that Mrs. Bush did not authorize or consent to the settlement upon which the Godfrey judgment was based. We need not spend time on that issue. That she was represented by competent counsel must be conceded. That she knew what she was doing must likewise be conceded.

On a motion for summary judgment we have held on many occasions that a party opposing such motion must do something more than simply rely upon the pleadings. Here there is nothing submitted, by form of affidavit or otherwise except mere conclusionary opinion, to show that the settlement was not made with Mrs. Bush's full consent. Rosvall v. Provost, 279 Minn. 119, 155 N. W. 2d 900 (1968); Ahlm v. Rooney, 274 Minn. 259, 143 N. W. 2d 65 (1966). It is also evident that Mrs. Bush was kept apprised of what was being done and of the action taken in her behalf by her attorneys. Whether or not she consented to the stipulation is a question of fact. The Godfrey court having determined that issue adversely to her, and no appeal having ever been taken from that determination, she is clearly now bound by it.

We then come to the question of whether the district court on appeal from an order of the probate court may grant summary judgment. This, in turn, revolves around the proper interpretation of the language in Minn. St. 525.72, where we find the following:

> "* * * Thereupon the cause shall be placed upon the calendar, tried, and determined in the same manner as if originally commenced in that court."

The crux of appellants' argument relates to the proper interpretation of Rule 81, Rules of Civil Procedure. Apparently it is the contention of appellants that since Minn. St. 525.72 does not expressly authorize the district court to entertain a motion for summary judgment on appeal from the probate court, its power to do so, if any, must be derived from Rule 56, Rules of Civil Procedure, which authorizes a district court in the exercise of its trial jurisdiction to order summary judgment, but that Rule 81.02 prohibits recourse to Rule 56. Rule 81.02 provides that the Rules of Civil Procedure "do not supersede the provisions of statutes relating to appeals to the district courts."

While much could be said in disposing of this contention, we think it sufficient to refer to the case of Nationwide Corp. v. Northwestern National Life Ins. Co., 251 Minn. 255, 87 N. W. 2d 671 (1958). We there held that the Rules of Civil Procedure would apply to a mandamus proceeding where the relevant statute, Minn. St. 586.08, provided that "proceedings [shall be] had, in the same manner as in a civil action." We held this language sufficient to invoke Rule 81.03, which states that "[w]here any statute * * * provides that any act in a civil proceeding shall be done in the manner provided by law, such act shall be done in accordance with these rules." In so holding, we attempted to outline a definite test

for determining the applicability of the rules to a particular statute. We said:

> "* * * Where a statute governing a civil proceeding, not superseded by our rules of civil procedure, provides that the proceeding shall be conducted in the same manner as a civil action or uses other language of like import, the statute adopts the procedure of the rules by reference in the absence of a specific provision in the statute itself inconsistent with the rules." 251 Minn. 266, 87 N. W. 2d 680.

Appellants argue in substance that Minn. St. 525.72 does not state that the proceedings shall be conducted in the same manner as a civil action but merely that they shall be "tried, and determined" in the same manner as a civil action. Thus, they argue, Rule 81.03 does not operate to incorporate by reference into Minn. St. 525.72 any of the Rules of Civil Procedure which govern pretrial proceedings. We think this argument is simply a play upon words. The words "tried, and determined in the same manner as if originally commenced in that court" must include the right to dispose of the case the same as if it had been commenced in the district court. We think this carries with it the right to grant summary judgment where there are no issues of fact to be tried or where the law bars litigation of such issues.

A motion for summary judgment calls for a determination of the issues of law when there are no material fact issues to be tried and results in a decision on the merits. In the authors' comment to Rule 56, Hetland and Adamson point out:

> "Rule 56 is a device designed to implement the stated purpose of the rules to secure a just, speedy and inexpensive determination of any action. A sum-

> mary judgment permits the court to make a prompt disposition of an action on the merits if there is no genuine dispute regarding the material facts, and a party is entitled to judgment under the law applicable to such established facts." 2 Hetland & Adamson, Minnesota Practice, Civil Rules Ann., p. 563.

Appellants argue in substance that one of the elements of the Nationwide test is absent in the instant case because Rule 56 is inconsistent with the provisions of Minn. St. 525.72. First, they argue, that Minn. St. 525.72 grants a substantive right to a trial de novo while Rule 56 permits summary dismissal with no trial at all. They argue in fact that in a trial de novo a court should have no power to cut short the proceeding except by granting judgment on the pleadings. In the case of Grier v. Estate of Grier, 252 Minn. 143, 145, 89 N. W. 2d 398, 401 (1958), we rejected the contention that the district court's granting of judgment on the pleadings denied appellants the right to a trial de novo, stating:

> "* * * Whether it be in an action initially commenced in the district court or in a proceeding brought to that court as a de novo matter by appeal from the probate court, an adversary's motion for judgment on the pleadings is properly granted if, as a matter of law, the appellant is entitled to no relief on the pleadings. Where the pleadings do not warrant the granting of any relief, there is no purpose in conducting a de novo trial on the merits."

The same would seem to be true of a motion for summary judgment. If there are no fact issues that can be litigated due to the bar of res judicata in the former action, it would make little sense to require a trial de novo. To construe the statute involved as permitting a motion for

judgment on the pleadings while forbidding a motion for summary judgment where there are no fact issues to be tried would simply be reviving the technicalities which the Rules of Civil Procedure seek to avoid and which were condemned by this court in *House v. Hanson*, 245 Minn. 466, 72 N. W. 2d 874 (1955).

In view of our determination that the decision in the Godfrey judgment is res judicata as to all the issues appellants seek to litigate, we need not decide whether estoppel or waiver also bars the litigation of these issues. If they are barred by res judicata, that ends the matter. We think that is the case here.

It is difficult to understand what appellants expect to accomplish by this litigation. The estate has now been largely, if not wholly, distributed according to the wishes of both Mr. and Mrs. Bush. If Mrs. Bush's right to have some control over the operation of the Foundation had any value during her life, that right has now vanished by virtue of her death. She no longer could have any voice in controlling the affairs of the Foundation and it seems to us that these claims are now moot.

Inasmuch as we hold that the Godfrey decision was res judicata of all of the issues appellants seek now to try, it must follow that the summary judgment of the court must be, and is, affirmed.

Affirmed.

MR. CHIEF JUSTICE SHERAN and MR. JUSTICE OTIS took no part in the consideration or decision of this case.

OPINION OF THE MINNESOTA DISTRICT COURT

DISTRICT COURT, SECOND JUDICIAL DISTRICT
STATE OF MINNESOTA, COUNTY OF RAMSEY

FILE NO. 383778

In the Matter of the Estate of Archibald G. Bush
a/k/a A. G. Bush,
Decedent.

Appeal of Mrs. Edyth D. Bush, a/k/a Mrs Archibald G. Bush, Surviving Spouse of Decedent, from Decree Relative to Renunciation of Will.

MEMORANDUM, STATEMENT OF FACTS, ORDER
ORDER FOR JUDGMENT

The above matter came on before the undersigned in the Court House, St. Paul, Minnesota 55102, on July 9, 1973, on motions as follows: by the executors of the Estate of Edyth Bush to be substituted as appellants herein; by The Bush Foundation, one of the respondents, for dismissal of the appeal and for judgment on the pleadings; and by the respondent executors of the Estate of Archibald G. Bush and respondent the Attorney General of Minnesota for summary judgment.

Messrs. Robins, Davis & Lyons by Sidney S. Feinberg, Esquire, and Messrs. Carlton, Fields, Ward, Emmanuel, Smith & Cutler by Owen Rice, Jr., Esquire, appeared as attorneys for the executors of the Estate of Edyth Bush.

Messrs. Haverstock, Gray, Plant, Mooty & Anderson, by Edward J. Callahan, Jr., appeared as attorneys for respondent The Bush Foundation.

Messrs. Smith, Blomquist, Vitko & Rummel by Neil P. Convery, Esquire, appeared as attorneys for respondents the executors of the Estate of Archibald G. Bush.

Curtis D. Forslund, Esquire, and Richard D. Mark, Esquire, appeared as attorneys for the respondent Attorney General for the State of Minnesota.

* * * * *

[The portion of the District Court's opinion here omitted is copied in the Opinion of the Supreme Court of Minnesota, A3 to A18.]

A foreign guardian may make claim in Minnesota. (Rules of Civil Procedure, 17.02). If a party dies and the claim is not extinguished or barred, the court *may* order substitution of the proper parties. (Rule of Civil Procedure, 25.01).

M.S. 573.01 reads in part:

> "A cause of action arising out of an injury to the person dies with the person of the party in whose favor it exists. . . . All other causes of action by one against another, whether arising out of contract or not, survive to the personal representatives . . ."

"Injury to the person" need not be construed to mean physical injury. In this case, if Mrs. Bush was not bound by her consent affixed to her husband's Will, then she had a personal right to renounce. The claim of her executors is that she was in effect deceived into relinquishing this right. Justice Bunn, speaking for our Supreme Court, said in *Guggisberg v. Boettger*, 139 Minn. 226, 166 N.W. 177 (1918):

". . . it is plain that a cause of action for fraud survives . . . (A) cause of action for fraud and deceit is not one for an injury to the person, but for an injury to property, and therefore survives death . . . (A) cause of action for injury to the property of an owner is assignable, and . . . a cause of action for malicious attachment of property is one for an injury to property."

The Supreme Court has held, however, that the right of the widow to renounce the provisions of her husband's Will is personal and that representatives of her estate upon her death may not renounce for her. (*Nordquist v. Sahlborn*, 114 Minn. 329, 131 N.W. 323 (1911). Justice Brown said:

"And though if the survivor be insane and incapable personally of making the election, it may perhaps be made by a duly constituted guardian, or by the probate court (citations); the right is personal to the surviving spouse, and does not pass on his or her death to the personal representative or heirs. (citations) The authorities are practically uniform upon the subject . . ."

In the instant case, however, Mrs. Bush, through the assistance of her guardians, did attempt to renounce her husband's Will while she was living. If that attempt was successful, then she acquired a valuable property right. If bad, then this entire appeal must fall. The purpose of the appeal is to determine whether she did acquire a property interest; and justice would seem to require an interpretation of the statute that would protect that property right if it did exist.

Thrusts of our problem in this case, then, are whether the Edyth Bush claim is extinguished or barred as a matter

of law; and whether respondents are entitled to summary judgment in their favor. At the hearing, the Court indicated that it was not prepared to determine right off whether the executors would or would not be substituted as appellants. Argument thereupon proceeded on the merits with that understanding.

To begin with, consideration for the District Court settlement before Judge Godfrey did exist. If not more, Mrs. Bush had received $2,100,000 and has never offered to return it.

On petitions in which her own attorneys affirmatively acquiesced, large sums, more than the value of the widow's rights, have been paid over to The Bush Foundation. She cannot represent to the Court as she has done, and then obtain these sums back on the theory that her representations were not true or that she did not mean what she had in fact represented. The executors clearly relied upon her representations to their detriment. She delayed so long in filing her attempted renunciation that this Court must find her guilty of such laches as will preclude her from renouncing the Will of her husband at this late time.

Because of the representations by Mrs. Bush, upon which the executors relied to their obvious detriment, she or her representatives or the representative of her estate are estopped from now renouncing the provisions of the Will. Complications as to funds delivered to the Foundation as property to which it was declared to be lawfully entitled should be apparent.

By standing aside and not attempting to exercise her election to renounce the Will for so long a time, Mrs. Bush waived her right to renounce.

The decision of the District Court in which Judge Godfrey entered his judgment and decree under date of April

10, 1970, settled the matter. This Court holds that the claim before it in this case is res judicata, that the appeal should be dismissed, and that respondents are entitled to summary judgment in their favor.

On these points of laches, waiver, estoppel and res judicata, the attorneys on all sides have been so thorough in their research and presentation that it would serve no useful purpose to them to repeat here the rulings they themselves have given to the Court.

It is assumed that this decision will be appealed. If it is going to be, at least counsel are well prepared and, in the interest of this community, ought to move along with due dispatch. The Court has no control over the general operation of the Foundation. With all that appears in the files, it finds nothing to indicate that it is, or is not, carrying out the desires of Mr. Bush. It does not appear clear what, with The Bush Foundation, Mrs. Bush believed to be wrong.

This and The Edyth Bush Foundation are a tremendous contribution to the City of St. Paul and its environs. Mr. and Mrs. Bush have both made great good available to the people here. If their wishes are ascertainable, they should be regarded as a moral factor to carry out; but the Court has no control over that in this proceeding. It can only express a hope that litigation can be brought to rest, that personality feelings, if any, be reduced, and that mutual diplomacy and give in ideas will bring the good to the community which both donors most certainly have intended.

The Court, having heard the arguments of counsel and examined their memoranda, having reviewed the facts submitted in the Court file, having been advised in the premises, and on all the files and proceedings herein,

IT IS ORDERED:

1. That the executors of the Estate of Edyth Bush be substituted in the place and stead of Edyth Bush as appellant herein.

2. That the motions for summary judgment in favor of the respondents be granted, and that The Bush Foundation, the Executors of the Estate of Archibald G. Bush, and the Attorney General have judgment that the appeal herein by the executors of the Estate of Edyth Bush be dismissed.

Let judgment be entered accordingly.

Dated this 20th day of July, 1973.

BY THE COURT

LESLIE L. ANDERSON
Judge of District Court (Retired)
Serving on Assignment by the
Supreme Court

ORDER DENYING REHEARING

STATE OF MINNESOTA
OFFICE OF CLERK OF SUPREME COURT

St. Paul, Minn.

December 23, 1974

Supreme Court No. 44707

In Re Estate of ARCHIBALD G. BUSH, Deceased

H. CLIFFORD LEE, CLARENCE J. BASSLER, JR., and THE COMMERCIAL BANK AT WINTER PARK, Co-Executors of the Estate of Edyth D. Bush, Deceased,
Appellants,

vs.

HERSCHEL S. ARROWOOD and MARY JANE DICKMAN, as Executors of the Estate of Archibald G. Bush, Deceased, and THE BUSH FOUNDATION, and WARREN SPANNAUS, Attorney General of the State of Minnesota,
Respondents.

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,

/s/ JOHN McCARTHY
Clerk Supreme Court

JUDGMENTS OF THE SUPREME COURT OF MINNESOTA

STATE OF MINNESOTA, SUPREME COURT

In re Estate of Archibald G. Bush, a.k.a. A. G. Bush, Decedent.

H. Clifford Lee, et al, Co-executors of the Estate of Edyth D. Bush, Deceased,
Appellants,

vs. 44707

Herschel S. Arrowood and Mary Jane Dickman, as Executors of the Estate of Archibald G. Bush, Deceased,
Respondents,

The Bush Foundation,
Respondent,

Warren Spannaus, Attorney General of the State of Minnesota,
Respondent.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Ramsey be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondent Bush Foundation herein, do have and recover of

appellants herein the sum and amount of Four Hundred Seventy-Nine and 41/100 - - - - DOLLARS, ($479.41) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed January 20, 1975

BY THE COURT

Attest: /s/ JOHN McCARTHY
Clerk

STATE OF MINNESOTA, SUPREME COURT

In re Estate of Archibald G. Bush, a.k.a. A. G. Bush, Decedent.

H. Clifford Lee, et al, Co-executors of the Estate of Edyth D. Bush, Deceased,

Appellants,

vs. 44707

Herschel S. Arrowood and Mary Jane Dickman, as Executors of the Estate of Archibald G. Bush, Deceased,

Respondents,

The Bush Foundation,

Respondent,

Warren Spannaus, Attorney General of the State of Minnesota,

Respondent.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Ramsey be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondents Herschel S. Arrowood and Mary Jane Dickman, as Executors of the Estate of Archibald G. Bush, Deceased, herein, do have and recover of appellants herein the sum

and amount of Nine Hundred Twenty-Eight and 28/100 - - - - DOLLARS, ($928.28) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed January 20, 1975

BY THE COURT

Attest: /s/ JOHN McCARTHY
Clerk

SUPREME COURT, U. S.

Supreme Court, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-980

H. CLIFFORD LEE, CLARENCE J. BASSLER, JR., and THE COMMERCIAL BANK AT WINTER PARK, Co-Executors of the Estate of EDYTH D. BUSH, Deceased,

Petitioners,

vs.

HERSCHEL S. ARROWOOD and MARY JANE DICKMAN, as Executors of the Estate of ARCHIBALD G. BUSH, Deceased,

and

THE BUSH FOUNDATION,

and

WARREN SPANNAUS, Attorney General of the State of Minnesota,

Respondents.

REPLY OF BUSH FOUNDATION TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF MINNESOTA

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March 4, 1975

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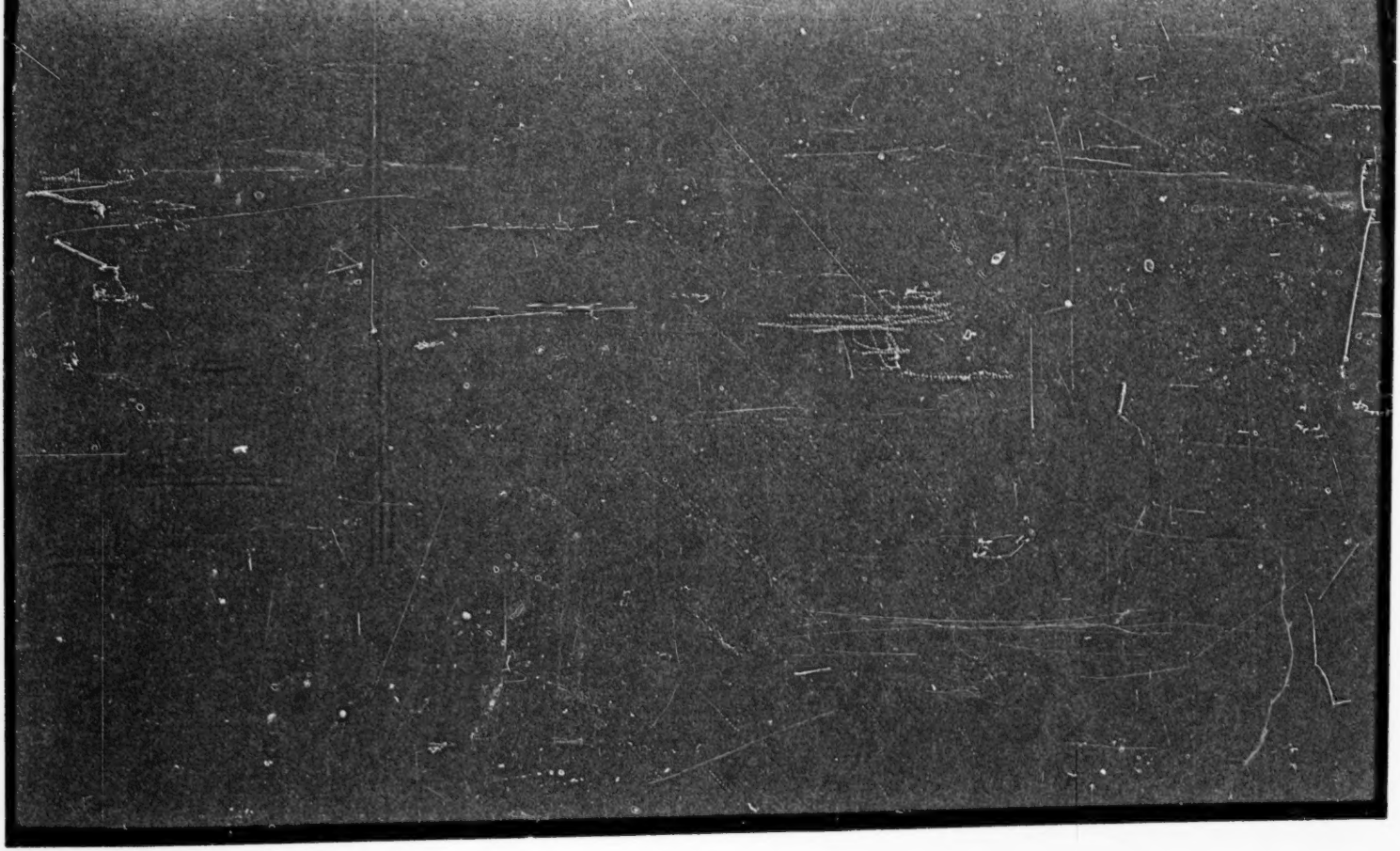

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

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H. CLIFFORD LEE, CLARENCE J. BASSLER, JR., and THE COMMERCIAL BANK AT WINTER PARK, Co-Executors of the Estate of EDYTH D. BUSH, Deceased,

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and

THE BUSH FOUNDATION

and

WARREN SPANNAUS, Attorney General of the State of Minnesota,

Respondents.

REPLY OF BUSH FOUNDATION TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF MINNESOTA

A number of years ago a well known performer of satirical songs by the name of Alan Sherman recorded a song he made popular in which he refers to a certain ladies dress which the character in the song is selling as "a genuine

copy of fake Dior". The so-called due process problem presented by the petitioners here bears almost as much resemblance to a true due process issue as the "genuine copy" does to the original dress.

As a start to their flight of fancy they have mistated to this Court the basic question presented. The Ramsey County Probate Court, the Ramsey County District Court on appeal, the Minnesota Supreme Court on appeal and again on a petition for rehearing all were faced with the basic issue presented by the provisions of *Minnesota Statute* 525.-212 (the "renunciation" statute) which reads as follows:

> "If a will made provision for a surviving spouse in lieu of the rights in the estate secured by statute, such spouse shall be deemed to have elected to take under the will *unless he shall have filed an instrument in writing renouncing and refusing to accept the provisions of such a will within six months* after the filing of the certificate of probate. *For good cause shown* the Court may permit an election within such further time as the Court may determine."

Undeniably no instrument in writing even purporting to renounce the will was filed for over 5½ years after the filing of the certificate of probate. Moreover, the Probate Court did not permit the petitioners to file a belated renunciation nor was good cause shown (Pet. Appendix A-15, A-18). Each Minnesota Court decided, reasonably enough, that the right of Mrs. Bush to renounce no longer existed. There was, therefore, no need to reach an additional question, to wit: Would Mrs. Bush's right to renounce, if exercised within six months of filing of the certificate of probate, nevertheless have been barred in any event by her written consent to the will of her husband.

QUESTION PRESENTED

The true question presented therefor is:

Whether due process is denied when a state court determines after a full hearing on undisputed facts, that a document filed more than 5 years after the statutory period does not constitute a renunciation.

The questions presented in the petition here, mistate the facts and circumstances, and even at best are expressive of only one of the many reasons why Mrs. Bush's representatives were not successful below.

ARGUMENT

It is, of course, obvious that to have even specious support for a due process claim, the petitioners must attempt to tie their claim to the Petition for Certiorari filed in this Court as No. 74-551, denied January 13, 1975, and most recently denied on requst for reconsideration on February 24, 1975. We assume that through that Petition and other memoranda connected with it, the Court is familiar with the background of the "renunciation" litigation presently under discussion and so we will not elaborate thereon in a separate statement of facts here. But we are pleased to note that at long last petitioners have abandoned any claim to have any right to recover damages for breach of the settlement contract of August 1966. (Petition, page 8). The phrase used by them is that Mrs. Bush has been "done out of" the right. She was not "done out of" it by the Minnesota courts in the action giving rise to the present Petition, however, because the Probate Court of Ramsey County has absolutely no jurisdiction over questions involving fraud or breach of contract, as all parties to the current action acknowledge. It did not and could not have passed upon

any such matter. As a result of the Probate Court's jurisdiction limitations in this regard, the District Court of Ramsey County, as an appeal court, also lacked jurisdiction to pass on them nor did it attempt to. The Foundation does concede that if a breach of contract or fraud action were properly commenced in Minnesota at this time, the result would be complete failure on the part of Mrs. Bush's representatives for reasons of res judicata and estoppel and the Statutes of Limitations among other. And it concedes that Judge Jergens of the Federal District Court was correct in his judgments on these points. And we point out that in the absence of a determination of breach of contract or fraud by a Court of competent jurisdiction the petitioners have not even the semblence of an argument to try to show "good cause" within the provisions of *M.S.A.* 525.212 (*supra*).

We also note that the Eighth Circuit does not share the shock of these petitioners at the application of the doctrine of res judicata arising from the judgment of Judge Godfrey April 10, 1970, nor is it unable to understand the clear import of the dicta in *Bush v. Arrowood,* 293 Minn. 243, 198 N.W.2d 263, 265 (1972).

> "We need not decide whether the personal rights of Mrs. Bush have been adjudicated and are therefore res judicata. The trial court felt that they were. The Minnesota district court in its memorandum and order, which is now on appeal to the Minnesota Supreme Court, indicates that the personal rights of Mrs. Bush have been adjudicated. The Judgment and Decree in the state court settlement (April 10, 1970) so indicates. See also *Bush v. Arrowood,* 293 Minn. 243. 198 N.W.2d 263, 265 (1972), *Bassler v. Arrowood,* 500 F.2d 138 (1974) p. 143

In any event (Petition, page 9), three reasons are advanced for granting the writ, none of which is in any way based upon the facts or legal conclusions of the Minnesota Court.

a) The Supreme Court of the State of Minnesota did not hold that the judgment in *Bush v. Arrowood, supra,* concerning fees, barred the rights of a litigant in this case.

The Court *did* comment (Petitioner Appendix A24, 25) that in fact the fee case did involve becoming familiar with the same *facts* used as the basis for their current decision, and it did suggest that petitioners would have been well advised to give considerable weight to the court's dicta in the fee case before embarking on this current flight of fancy. We assume the Eighth Circuit would have a similar reaction if called upon now to decide the breach of contract claim on its merits rather than on the grounds of abstention.

b) The Supreme Court of Minnesota did not hold that a judgment may operate as res judicata without a hearing determining Mrs. Bush was a party to the judgment. In fact, the Court in its opinion, (Pet. Appendix, beginning on page 9 through 13) sets out a considerable amount of undisputed and indisputable evidence upon which it reached its determination Mrs. Bush was a party to the judgment in *Bush v. Arrowood, supra,* personally, and on pages A21 through A23 the Court further considered the evidence and its effect. The Court's conclusions were clearly correct, but it is not their correctness which dispose of the due process problem, it is the fact that the issues were fully and fairly presented for adjudication.

Neither did the Court determine that a judgment was res judicata without evidence on whether the issue held foreclosed could have been raised in the prior proceedings.

Instead it held that on the evidence of the pleadings, settlement and judgment by Judge Godfrey, the issue foreclosed had *in fact* been raised in the prior proceedings *with Mrs. Bush's consent*, without objection, and had been settled, referring specifically to the Attorney General's claims and Mrs. Bush's reply in that case.

c) Lastly the Court did not determine that an action by Mrs. Bush *in a representative capacity may be res judicata* of the personal rights of Mrs. Bush. It held that Mrs. Bush was *not*, in fact, litigating in a representative capacity or merely in that capacity, but was litigating her own personal rights in seeking to uphold the August 1966 settlement and retain her $2,100,000.

[As to Mrs. Bush's alleged incapacity, not only is there no evidence or support for these allegations [Appendix A26] but the legal proposition stated that "nor can any judgment bind one known for more than a year prior to the entry of the judgment to have been incompetent (Pet. 9) is pure nonsense.]

Mrs. Bush in the case before Judge Godfrey "sought only to compel respondents to carry out her husband's will" say the petitioners (page 8). She also sought to retain the $2,100,000 she received in consideration of her execution of the settlement agreement (A-11). Before Judge Godfrey she was successful on both counts, and her success is memorialized in the judgment. Let her not complain now that she got her way. Nothing could be less in accordance with the objective of carrying out her husband's will than to renounce it. The petitioners may disagree with the rulings in the current case, but they cannot deny all issues raised here were considered and decided upon evidence cited in the opinion of the Minnesota Supreme Court.

CONCLUSION

The Writ should not issue, the Petition should be denied with costs and disbursements to respondent.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-980

H. CLIFFORD LEE, CLARENCE J. BASSLER, JR., and THE COMMERCIAL BANK AT WINTER PARK, Co-Executors of the Estate of Edyth D. Bush, Deceased,
Petitioners,

vs.

HERSCHEL S. ARROWOOD and MARY JANE DICKMAN, as Executors of the Estate of Archibald G. Bush, Deceased

and

THE BUSH FOUNDATION

and

WARREN SPANNAUS, Attorney General of the State of Minnesota,
Respondents.

BRIEF OF RESPONDENTS HERSCHEL S. ARROWOOD AND MARY JANE DICKMAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

HISTORY OF THE CASE

The significance of the conclusionary remarks made by the Minnesota Supreme Court expressing difficulty in comprehending the purpose of the litigation which Petitioners continue to pursue, becomes more apparent when the historical aspects of the case are considered. (Petitioners' Appendix, A30).[1]

Mr. Bush died on January 16, 1966, less than one year after executing his Will in which he left a few bequests to friends and relatives and a life estate in a Florida home to his wife. The residue he left to The Bush Foundation, which was established by him during his life. His wife consented to this disposition. (A10).[1] In view of the size of his estate, approximately $124,000,000 at the time of his death, such a modest portion passing to his surviving spouse might be expected to raise a question as to its propriety were it not for the fact that, as mentioned in his Will, he and his wife had frequently discussed their testamentary plans and had agreed to this limited bequest for her. The nature of their testamentary plans becomes evident when upon her death she was found to have left an estate of her own valued by her counsel at approximately $130,000,000. Both the execution of Mr. Bush's Will and the consent thereto by his wife, Edyth Bush, were witnessed by three attorneys, one of whom was David R. Roberts, Mr. Bush's personal lawyer.

Within six months after Mr. Bush's death, his wife threatened to renounce her husband's Will, claiming that she had

[1] Pagination preceded by the designation of Petitioners' Appendix refers to the Appendix filed with the Petition of Petitioners herein; all other references are to an Appellants' Appendix filed as part of the record in the case before the Minnesota Supreme Court whose decision Petitioners seek herein to have reviewed.

not been fairly informed of the nature and consequence of her written consent. The threat never materialized when the executors of her husband's estate entered a settlement agreement in August, 1966, from which she received $2,100,000 from the estate. Contemporaneously, the Board of Directors of The Bush Foundation gave her a veto power over the Foundation's operation. Shortly thereafter, in October, 1966, Mrs. Bush executed a new Will setting up her own foundation as the residuary legatee of her estate, designating her personal attorneys, David R. Roberts, as the attorney to probate her estate, and H. Clifford Lee, to serve as co-executor with E. G. Banks, the President of the Commercial Bank at Winter Park, Florida. Messrs. Roberts, Lee and Banks are also designated as directors of her foundation, The Edyth Bush Foundation, established by her in her Will. (A65 to A75).

Becoming displeased with both the administration of her husband's estate and the operation of his foundation (The Bush Foundation), Mrs. Bush, in January, 1968, commenced the lawsuit which culminated in the decision of Judge Godfrey, the "Godfrey judgment" of which the Petitioners now complain (Petitioners' Brief, p. 8). This decision was based on a stipulation entered in September, 1969, between all parties to that litigation, and signed by four lawyers representing Mrs. Bush. In that stipulation, she agreed to a restructuring of The Bush Foundation Board of Directors in which her veto power over The Bush Foundation was in effect surrendered.

Mrs. Bush was adjudicated to be incompetent in November of 1970, and David R. Roberts, then serving as her personal lawyer, and the Commercial Bank at Winter Park were appointed guardians of her estate. She remained an adjudicated incompetent until her death on November 20, 1972.

It is only after Mrs. Bush was adjudicated an incompetent that the instant litigation was commenced in Minnesota on October 12, 1971, by David R. Roberts and the Commercial Bank at Winter Park, who filed in Ramsey County Probate Court a resurrected document entitled "Renunciation of Will" dated August 5, 1966, and signed by Mrs. Bush, in which she claimed, in essence, that she did not know what she was signing when she consented to her husband's Will. The bar of the August, 1966, settlement agreement between Mrs. Bush and the executors of her husband's estate is being set aside by her guardians' novel assertion (among other claims) that the loss of a veto power[2] over a foundation's operation by a 90-year-old woman (after, according to the Petitioners, she has become incompetent) constitutes a material breach of that agreement.

THE QUESTIONS PRESENTED BY APPELLANTS HAVE NO BASIS IN FACT

It is claimed that in the litigation which went to judgment before Judge Godfrey, Mrs. Bush did not appear in a personal capacity. However, as observed by both the lower Court and the Minnesota Supreme Court, which held the judgment to be res judicata as to the issues now raised, she was in fact suing as an individual and did in fact receive a personal benefit from that court determination (Petitioners' Appendix, A21). That action, entitled *Bush vs. Arrowood*, Ramsey County District File No. 356691, was commenced in January, 1968,

[2] Whether such a power is contrary to public policy and therefore not lawfully exercisable has never been determined by any court though the question of its legality has been raised by the Attorney General of the State of Minnesota (A461).

by Mrs. Bush, in her name as a Class B Director,[3] together with the other Class B Directors of The Bush Foundation, H. Clifford Lee (one of her personal attorneys) and Clarence J. Bassler (her nephew), against the executors of Mr. Bush's estate and the Class A Directors of The Bush Foundation. Mrs. Bush chose this action not only to resolve personal claims and issues raised by the parties in their pleadings, but even went so far as to interject into that case the issue of the validity of her own Last Will and Testament, which Judge Godfrey, at the urging of her attorneys, made specific findings concerning its validity in his judgment, and permanently enjoined The Bush Foundation from ever making a claim against her estate by virtue of a prior Will. (A160-166 at p. 163). While in form her action may have appeared to be representative in nature, in substance it was a personal action by her and her appointees.

Petitioners' assertion that Mrs. Bush was incompetent when the "Godfrey judgment" was entered is contradicted by the record since the stipulation for judgment was agreed upon and signed on September 17, 1969, by four of her attorneys from the two law firms working on her behalf, Lord, Bissel & Brook from Chicago, and Oppenheimer, Hodgson, et al, from St. Paul. Judge Godfrey's judgment based on that stipulation was entered on April 10, 1970. The first knowledge that we have of Mrs. Bush's incompetence is on November 6, 1970, which is the date of Letters of Guardianship issued to her personal lawyer, David R. Roberts, and the Commercial Bank at Winter Park. Both Mr. Roberts, who started this action, and Mr. Lee,

[3] "Class B" was a class of directorship consisting of Mrs. Bush and her appointees, Mr. Lee and Mr. Bassler, set up by the original directors who themselves were thereafter designated as the "Class A" directors. Since the Board could not act without concurrence of both classes, Mrs. Bush through her appointees had a veto power over the Foundation's operation.

who continues this action, acting as Mrs. Bush's attorneys-in-fact, advised Judge Godfrey during the proceedings before him as late as February 2, 1970, that three of the lawyers representing Mrs. Bush in that action continued to have her authority to represent her. (Addendum p. 1). No mention was made at that time by these personal attorneys of Mrs. Bush that she was incompetent but rather the statement would lead all to believe the contrary. The present claim by the Petitioners that Mrs. Bush was incompetent during the time that her action was submitted to Judge Godfrey has not even been given a blush of color by a single affidavit from the Petitioners at any time during the sojourn of this case from its inception in Ramsey County Probate Court before Judge Glenn, followed by its appeal to Ramsey County District Court before Judge Anderson and its subsequent appeal to the Minnesota Supreme Court.

The second basis asserted by Petitioners in their claim of a denial of due process is that the issue of Mrs. Bush's right to renounce her husband's Will was not raised in the case before Judge Godfrey. In that action, Mrs. Bush vigorously defended her right to retain the $2,100,000 she received from the executors of her husband's estate to settle her threatened renunciation claim. This issue was raised in the pleadings by the Defendant Attorney General of the State of Minnesota and Defendant Class A Directors of The Bush Foundation. A percursory examination of Judge Godfrey's judgment substantiates that the issue was resolved in her favor. (A163, 165).

Finally, to say that there has never been evidence or a hearing in any court on any of the questions raised by Petitioners is to ignore the record which is replete with pleadings and documents containing statements and admissions of fact which were submitted by Mrs. Bush's attorneys on her behalf in the many courts her attorneys have guided her through.

CONCLUSION

There is no genuine constitutional question involved in this case. As did the Minnesota Supreme Court, this court also may ask what Petitioners expect to accomplish by the instant litigation. The only real question involved here is whether $62,000,000 ($100,000,000 as claimed by Petitioners) will pass to the intended legatee, The Bush Foundation, or will pass to a deceased woman's estate to endure further probate and diminution before coming to rest in another foundation over which these Petitioners have control. The Petition herein should be denied and Respondents allowed their cost and disbursements.

Respectfully submitted,

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ADDENDUM

NOTICE OF NON-REPRESENTATION BY CERTAIN COUNSEL

(Dated February 2, 1970)

(Ramsey County No. 356691—Caption omitted in printing)

To the Honorable Otis H. Godfrey, Jr. and all Counsel of Record:

PLEASE TAKE NOTICE that Messrs. T. C. Dillers, Thomas P. Healy, and Lord, Bissell and Brook all of Chicago, Illinois, no longer represent Mrs. Archibald G. Bush and Mr. H. Clifford Lee as "B" Directors of The Bush Foundation and as Plaintiffs in the above entitled action effective January 21, 1970.

You are also advised that Messrs. Benno F. Wolff, David C. Donnelly, John G. Robertson and Oppenheimer, Brown, Wolff, Leach and Foster continue to represent Mrs. Archibald G. Bush and Mr. H. Clifford Lee as "B" Directors of The Bush Foundation and as Plaintiffs in the above entitled action.

Mrs. Archibald G. Bush
By /s/ David R. Roberts
Her Attorney-In-Fact
And
By /s/ H. Clifford Lee
Her Attorney-In-Fact
/s/ H. Clifford Lee

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Supreme Court of the United States

October Term, 1974

No. 74-980

H. CLIFFORD LEE, *et al.*,
Petitioners,

v.

HERSCHEL S. ARROWOOD, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO SUPREME COURT OF MINNESOTA

PETITIONERS' REPLY TO THE BUSH FOUNDATION BRIEF

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0647

Supreme Court of the United States

October Term, 1974

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Petitioners,

v.

HERSCHEL S. ARROWOOD, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO SUPREME COURT OF MINNESOTA

PETITIONERS' REPLY TO THE BUSH FOUNDATION BRIEF

Unblushing charge of fakery—a rogue's first defense —can neither excuse nor justify predatory conduct that mocks due process and despoils a litigant of a legal right.

Were it true, as is now asserted by The Bush Foundation (in hope to escape review) that the widow has been barred of the widow's share of her husband's estate (pp. 3, 5, 6) "after a full hearing," or "on undisputed facts," or "indisputable evidence," or that even a single issue now in suit was "considered and decided upon evidence" this case would not be here.

The blunt fact—that the Foundation, by extravagance of statement, would hide—is that the widow has been done out of her right on the ground that the earlier state

court judgment is res judicata when there *has never been a hearing*, or *evidence*, *in any court*, *anywhere*, on the critical questions:

> *Whether* the issue of the widow's right to renounce was, or could have been, in issue,
>
> *Whether* the widow was a party in other than a representative capacity, and
>
> *Whether* the widow's incompetence when the judgment was entered would in any event bar its application as res judicata.

Equally erroneous is the contention (p. 3) that the widow has abandoned claim to damages "for breach of the settlement contract."

She has *not* abandoned; it has been taken from her by the Minnesota Supreme Court's *ipse dixit* in lieu of the due process the Constitution demands. The fact alone that such right could so be taken emphasizes the need for this Court's voice to make clear rights are *not* so to be disposed of.

Pretense (p. 6) that the widow litigated to "retain her $2,100,000" is quite inaccurate. Since The Bush Foundation finds it important to refer to it, the Court should know the husband gave the family's Florida estate to The Bush Foundation, subject to the proviso that:

> "So long as she wishes to occupy the premises my dear wife, Edyth Bush, is to have the right to do so free of charge."

Respondents, strangely, took the position that this gave the widow a right "to occupy"—a right that would be lost should she leave the premises. Moreover, asserted respondents, it excused *only* payment of "rent", and required the widow to pay for the upkeep, maintenance, taxes, insurance and every other expense of every kind of the 38 acre estate.

To settle *that* controversy, $2,100,000 was paid.

It had nothing to do with renunciation.

But even if it had been paid to induce the widow to withhold—until the time had passed—filing the renunciation she had signed it would not excuse the fraud, the breach of contract, or the destruction of the widow's right by a ukase that denies due process. It signals need for the Court to look into what here has happened.

Respectfully submitted,

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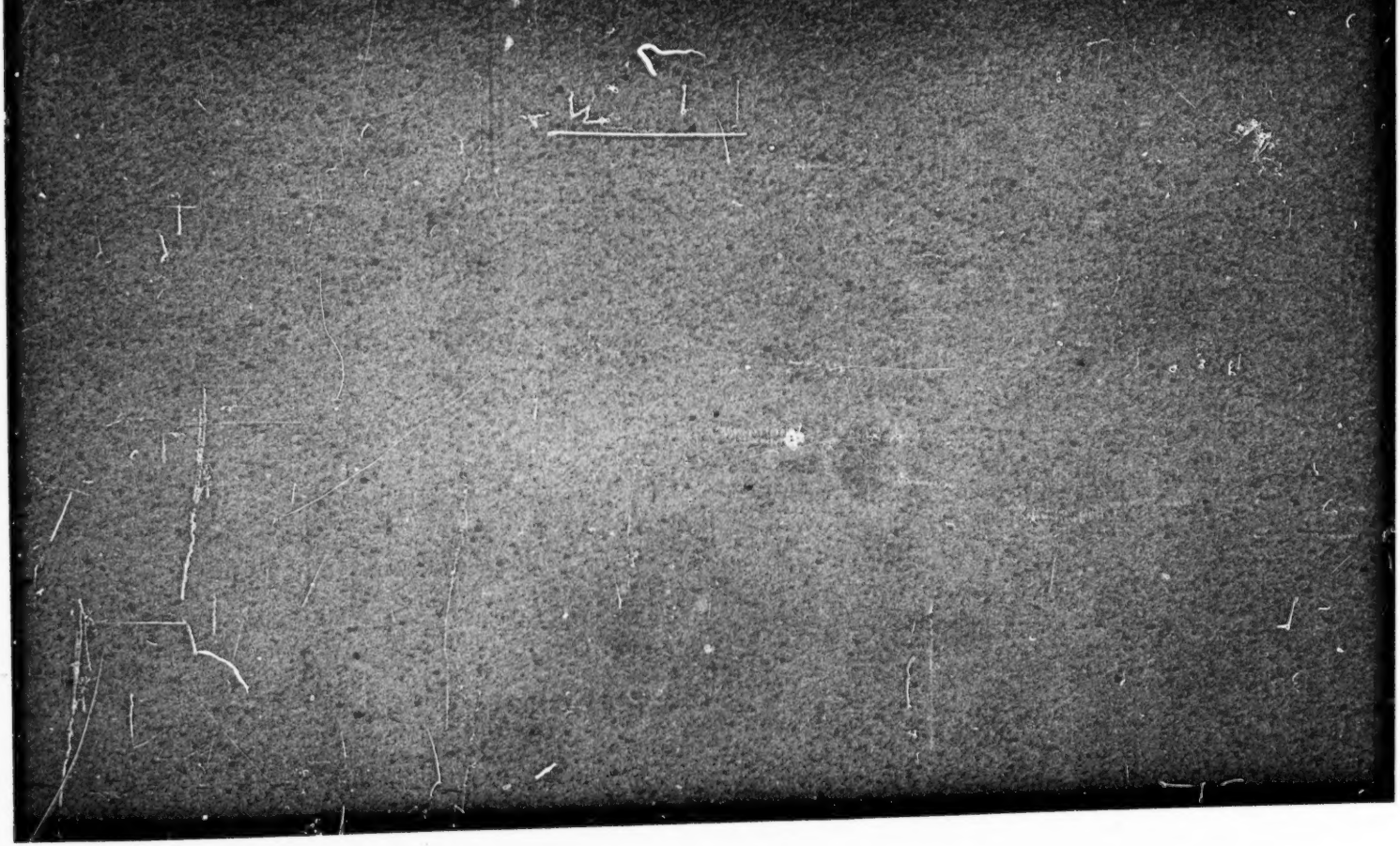

COURT, U. S.

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MICHAEL RODAK, JR., C

Supreme Court of the United States

October Term, 1974

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H. CLIFFORD LEE, *et al.*,
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Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO SUPREME COURT OF MINNESOTA

PETITIONERS' REPLY TO BRIEF OF EXECUTORS

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The brief filed by Respondent Executors underlines the need for review.

The Court will have observed Respondents *do not deny* that they:

1. *Stalled*, for their own purposes, closing the husband's estate.
2. *Refused to conduct* the affairs of the Foundation in the manner the widow and her husband had planned. Respondents repudiated not only the settlement but also the Resolution of the Foundation Board. The Board wished "to seek and be guided by the wisdom and leadership of Mrs. A. G. Bush," the widow, and:

"RESOLVED, that all requests for gifts or grants, as well as all other proposed gifts, grants, or op-

erations of the Foundation, be first submitted to Mrs. A. G. Bush, so that the Board may have the full benefit of her recommendations with respect to such grants, gifts, and operations, prior to the time that any action is taken by the Board with respect thereto."

This, as it now appears, was baiting the trap.

3. *Pursued the Probate Judge to the ski slopes of Vail, Colorado*, outside the geographic jurisdiction of the court, to obtain an ex parte order, without notice to the widow, or her counsel, or counsel of record for her husband's estate, (a) vacating the adjudication that the Foundation *is* the residuary legatee under the husband's will, and (b) vacating the order to distribute to the Foundation.

4. *Refused to appeal* that extrajudicial order.

5. *Activated a potential alternative* recipient of the husband's estate in competition with the Foundation.

6. *Asked the court to vacate* its order approving the settlement with the widow.

Thus, the trap was sprung.

The settlement contract was treated as good enough to induce the widow to withhold filing the renunciation she had signed; it was not good enough to honor.

Respondents excuse destruction of the widow's right on the ground it is a "novel" idea (p. 4) "that the loss of a veto power over a foundation's operations by a 90-year-old woman (after, according to the Petitioners, she has become incompetent) constitutes a material breach of that agreement."

This is to say an old woman's right is not "material."

For this callous attitude Respondents look to the Godfrey judgment for absolution.

The Godfrey judgment, consistently with the inexorable demand of due process, *cannot be made res judicata*:

1. *Of the widow's personal right.* Respondents assert the widow's lawyers (p. 6) "advised Judge Godfrey * * * that three of the lawyers representing Mrs. Bush in that action continued to have her authority to represent her." This is disproved by the "Addendum p. 1" Respondents cite as proof. It shows the lawyers were acting for Mrs. Bush *and* Mr. Lee *solely* in their representative capacity "as 'B' Directors," and *not* in any personal capacity.

2. *Of the renunciation issue.* The Godfrey action was brought to compel Respondents to carry out the settlement contract. Renunciation was not even mentioned. The judgment destroyed the settlement. The consequence is that the widow is entitled either (a) to be restored to her right to renounce—which she gave up in reliance on the settlement (which, as now appears, Respondents never intended to honor) or (b) to damages for the breach.

3. *Of the widow's competence.* She had been incapacitated for more than a year when the Godfrey judgment was entered.

The shocking fact is that on these issues at no time has there been evidence, or hearing, in any court, anywhere.

Until the right to a hearing is accorded a constitutional right is denied.

Respectfully submitted,

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